PRIVY COUNCIL.

P. C.*
1888
May 2.

CHAND KOUR AND ANOTHER (DEFENDANTS) *v.* PARTAB SINGH AND OTHERS (PLAINTIFFS).

[On appeal from the Chief Court of the Punjab.]

Res-judicata—Dismissal of suit for default—Difference in causes of action—Civil Procedure Code, ss. 13, 102, 103.

The dismissal of a suit in terms of s. 102, Civil Procedure Code, is not intended to operate in favor of the defendant as *res judicata*. When read with s. 103, it precludes a fresh suit in respect of the same cause of action, referring, irrespectively of the defence or the relief prayed, entirely to the grounds, or alleged *media*, on which the plaintiff asks the Court to decide in his favor.

Brother's sons, as nearest agnates of a deceased proprietor, sued for a decree, declaring that a gift, before then made by the widow in favor of her daughter's son, of the estate of her late husband, would not operate against their right of succession on her death. A prior suit, before the date of the gift, brought by two of the plaintiffs for a declaratory decree, and an injunction restraining the widow from alienating the same estate, had been dismissed under the provisions of ss. 102 and 103 (Act X of 1887), Civil Procedure Code.

Held, that the causes of action in the two suits were not identical, and the fresh suit was not precluded by s. 103, the gift having afforded the new ground of claim, which also had subsequently arisen.

APPEAL from a decree (16th May 1884) of the Chief Court, modifying a decree (2nd January 1883) of the Commissioner of the Jullundur division, varying after a remand to the Judicial Assistant Commissioner of the Gurdaspur district, and a return thereto (30th September 1882), a decree (16th May 1882) of the latter Judge.

The suit out of which this appeal arose was brought on the 11th February 1882 by the heirs, brother's sons, of a proprietor deceased in 1848, for a declaration that a gift made in 1879 by his widow, who had succeeded to his estate, would be inoperative as against their rights of inheritance whenever she should die. But the only question on this appeal was as to the application of ss. 102 and 103, Civil Procedure Code.

* *Present:* LORD WATSON, LORD HOBHOUSE, and SIR R. COUCH.

Mussamut Chand Kour, the donor, was the widow of Sirdar Kahan Singh, who having gone, with his only son by her, to Multan, in 1849, was there killed, and the son also. Kahan Singh was a sharer to the extent of rather more than 200 ghumaos in villages Aliwal and Man Sandwal in the Gurdaspur district, where the widow remained; and his only other child was a daughter, who in after years had one son, Perak Singh. The widow, on the 29th March 1879, executed the deed of gift, now disputed by the sons of Kahan Singh's brothers, who in this suit claimed a declaration that it should not affect their rights to accrue on the death of the widow. The deed declared: "As I have kept with me my daughter's son, Perak Singh, son of Beja Singh of Majitha, now residing at village Man, from his birth, and have brought him up like a son, therefore I have, without any receipt of money, made a gift in his favor of the following property:" giving a list of Kahan Singh's holdings, according to the *khewat* of the villages above named.

Before this gift was made, on the 1st August 1878, two of the plaintiffs in the present suit, *viz.*, Partab Singh and Golab Singh, sued the widow claiming a declaratory decree, and an injunction forbidding the alienation of Kahan Singh's property. A further petition was filed on 30th August by them, asking that she might be restrained from selling or mortgaging pending the decision of that suit. The plaintiffs failed to appear at the hearing, and the result was that, on the 7th October 1878, the Judicial Assistant Commissioner made the order, which is set forth in their Lordships' judgment, dismissing the suit under s. 102, Civil Procedure Code.

For the defence of the present suit, it was set up that the order, dismissing the former one, barred it. The widow also alleged her right to make the gift to her daughter's son, who had, as she maintained, been adopted by her to Kahan Singh, under a power given to her by him on departing.

The Judicial Assistant Commissioner decreed in favor of the plaintiffs, holding that the present suit was not barred under s. 13, nor was within the provisions of ss. 102, 103; there not having been, in the former suit, any claim to set aside an existing gift. He also found that the alleged power to adopt

1888

CHAND KOUR v. PARTAB SINGH.

was not proved; and held that the custom of descent, giving the inheritance to the brother's sons, as being nearer than a daughter's sons, could not be set aside.

The Commissioner, after a remand for further evidence, found the authority to adopt had not been established. He supported the gift only so far as it might relate to the widow's own estate. The decree of the lower Court was accordingly, in the main, upheld.

Both parties appealed to the Chief Court. That Court (Baden-Powell and Burney, JJ.) held that the suit was not brought upon the same cause of action as the previous one had been; the gift having been a new and subsequent act. The suit might, therefore, be maintained. As to the alleged adoption, the Judges were of opinion that, though something might have been said by the Sirdar, on his going on military service with his son, about the succession in the event of his death, no such proof of definite authority to adopt had been given as would be necessary before the ordinary course of succession could be set aside.

The result was a decree in the plaintiffs' favor, declaring that the deed of gift of 29th March 1879 was void and of no effect in respect of all the lands which it purported to convey to Perak Singh, as against the plaintiffs' reversionary interests.

On this appeal,—

Mr. *J. D. Mayne*, and Mr. *C. W. Arathoon*, for the appellants, argued that the suit of 1878, having been dismissed under s. 102, the present suit fell within the prohibition of s. 103. The claim then made was more general than the present, having in view any mode of alienation by the widow, which it sought to have prohibited. The widow's making a deed of gift was included in the general term alienation. If a claim or ground arose out of, and depended upon, the same right as that which was in question in the former suit, it would come under s. 13 as *res judicata*. *Hunter* v. *Stewart* (1), *Thakur Shankar Baksh* v. *Daya Shankar* (2) were referred to.

The respondents did not appear.

(1) 13 L. J. Ch., 349.

(2) L. R., 15 I. A., 66; I. L. R., 15 Calc., 422.

1888

CHAND KOUR v. PARTAB SINGH.

Their Lordships' judgment was delivered by

LORD WATSON.—In this case the defendants in the original suit, who bring this appeal, are: (1) Mussamut Chand Kour, widow of the late Kahan Singh; and (2) Perak Singh, to whom the first appellant in 1879 made over by deed of gift the fee of her deceased husband's estate. The plaintiffs and respondents are the four nearest agnates of Kahan Singh, and the present suit was instituted by them for the purpose, *inter alia*, of obtaining a declaration that the widow's gift is inoperative and cannot affect their reversionary rights. It is admitted that Chand Kour has merely a widow's interest in the estate; and it is also admitted that Perak Singh, in whose favour she executed the deed of gift, is a stranger to the succession. The only point which has been argued on behalf of the appellants is, that the suit is barred by certain proceedings in a suit which was begun and concluded, in the Court of the Judicial Assistant Commissioner, before the date of the deed of gift. That action was instituted by two of the respondents, Partab Singh and Golab Singh, and their plaint prayed for a declaratory decree, and for an injunction forbidding alienation of the moveable and immoveable property of the deceased, which was then in the possession of his widow. The plea in bar can only affect these two respondents, and cannot exclude the other respondents from obtaining a declaratory decree in this suit, which will have the effect of protecting the reversionary interests of themselves and of their lineal descendants.

The proceedings which followed upon the plaint in the suit referred to were these: A defence was lodged for the widow, and on the 7th October 1878 the Judicial Assistant Commissioner pronounced this order, which has become final: "As the plaintiff has not appeared, though waited for up to the rising of the Court, and as the defendant, who is represented by her agent, denies the plaintiff's claim, it is ordered that the case be struck off under s. 102, Civil Procedure Code."

The provisions of ss. 102 and 103 of Act X of 1877 require therefore to be considered. The dismissal of a suit in terms of s. 102 was plainly not intended to operate in favour of the defendant as *res judicata*. It imposes, however,

1888

CHAND KOUR v. PARTAB SINGH.

when read along with s. 103, a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

The Judge of first instance, the Assistant Commissioner, held that the cause of action set forth in the present plaint is not the same with that disclosed in the plaint of 1878. The Commissioner differed from that view, but it was upheld by two Judges of the Chief Court of the Punjab upon appeal. Their Lordships are of opinion that the decision of the Assistant Commissioner and of the Chief Court is in accordance with the Statute. The ground of action in the plaint of 1878 is an alleged intention on the part of the widow to affect the estate to which the plaintiffs had a reversionary right by selling it, in whole or in part, or by affecting it with mortgages. The cause of action set forth in the present plaint is not mere matter of intention, and it does not refer to either sale or mortgage. It consists in an allegation that the first defendant has in point of fact made a *de præsenti* gift of their whole interest to a third party, who is the second defendant. That of itself is a good cause of action if the appellants' right is what they allege. It is a cause of action which did not arise, and could not arise until the deed of gift was executed, and its execution followed the conclusion of the proceedings of 1878.

It appears to their Lordships that the two grounds of action, even if they had both existed at the time, are different. If there had been a deed of gift in 1878 it might have afforded another and separate ground for granting the remedy which was prayed in that suit; but in point of fact it did not exist; and it is impossible to say that a cause of action, which did not exist at the time when the previous action was dismissed, can be regarded as other than a new cause of action subsequently arising.

1888

CHAND KOUR v. PARTAB SINGH.

Under these circumstances their Lordships are of opinion that the judgment appealed from ought to be affirmed, and the appeal dismissed, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

C. B.

P. C.* 1888 *May* 3.

KAMINI DEBI (PLAINTIFF) *v.* ASUTOSH MUKERJI AND OTHERS (DEFENDANTS).

ASUTOSH MUKERJI AND OTHERS (DEFENDANTS) *v.* KAMINI DEBI (PLAINTIFF).

[On appeal from the High Court at Calcutta.]

Res judicata—Civil Procedure Code, s. 13*—Substantial matters in issue decided in a former suit—Right of shebait-ship of a family deb-sheba under a will.*

A testator, who died leaving widows and a daughter, also three surviving brothers, bequeathed all the residue, after certain legacies, of his acquired estate to maintain the worship of a family deity, appointing his three brothers and his eldest widow to be shebaits, and providing that "the family of us five brothers shall be supported from the *prosad*, "offerings to the deity."

One or other of the brothers then for some years managed the estate as shebaits, and the survivor of them was succeeded by his son, one of the defendants in the present suit, which was brought by the testator's only daughter as heiress to his estate, claiming that the Court should determine "those provisions which were valid and lawful, and those which were invalid and illegal." She claimed possession and an account, and also to be the shebait.

In a previous suit the present shebait had obtained a decree, to which the daughter, now plaintiff, was a party defendant, affirming the validity of the will and the rights of the members of the family to be maintained under it.

Held, that the question of the validity of all the provisions of the will having been substantially decided in the decree in the former suit which pronounced that the will was wholly valid, passing the entire estate of the testator to the *deb-sheba*, and maintaining the rights of members of the family under the will, this suit was barred under s. 13 of Act X of 1877 as to all but the claim to be shebait. The plaintiff's claim to a preferential title to this office depended on a sentence in the will, constituting,

* *Present*: LORD WATSON, LORD HOBHOUSE, and SIR R. COUCH.

1888

KAMINI DEBI v. ASUTOSH MUKERJI.

as construed by the Courts below, to be shebait the senior in age of the heirs of the original shebaits, the defendant now holding the office coming within this provision according to the judgments of both Courts. As to this no reason had been shown in appeal for a different conclusion.

APPEAL and cross-appeal from a decree (15th September 1883) of the High Court, in part varying, and in part affirming, a decree (3rd September 1881) of the Subordinate Judge of the District of the 24-Pergunnahs.

The main question on these appeals was whether the validity of provisions in a will constituting a family *deb-sheba*, and providing for the maintenance of the members of the testator's family, had been directly and substantially affirmed by a decree in a suit in which the present plaintiff, claiming as the daughter and heiress of the testator, was a party defendant, those who were plaintiffs in the former suit being now defendants.

The object of the present suit, which was instituted on the 6th May 1880 by the only daughter of the testator, the late Ramkomul Mukerji, was to obtain from the Court the proper construction of his will; to have it declared what provisions in it were lawful and valid, and which of them were invalid; to have declared the rights of the several parties entitled to the estate; to obtain possession of such part of the estate as she might be entitled to, and to have an account directed; to have ascertained and declared what was the nature and interest of the religious foundation, or *deb-sheba*; to have partition of that part of the testator's estate in respect of which it should be determined that the members of the family had joint rights, if any. Lastly, Kamini Debi claimed that a proper person should be appointed shebait, whether the plaintiff or any one else.

The will was dated 23rd Magh 1251, or 4th February 1845, and was registered. It was addressed to the testator's eldest wife, Baroda Sunderi, and to his brothers Ramkumar, Modhu Sudon, and Chunder Mohun.

After reciting that his properties, consisting of lands, houses, money and Government promissory notes, were his own and self-acquired, and directing the payment of his debts and the maintenance of his father, a resident of Benares, and the payment of the expenses of the marriage of this appellant and of the

1888.

KAMINI DEBI v. ASUTOSH MUKERJI.

gift of a house and certain lands to her, and of the payment of certain further sums to her and her widowed sister, and to the testator's three wives, and to the widow and daughters of his deceased brother Dino Nath, and to Kamini Debi, the testator's daughter, the will continued thus :—

"All that remains after the above legacies, &c., are paid, I give unto the Thakur Gopaljiu, consecrated by my mother. You four are hereby appointed as shebaits. The daily worship of Gopaljiu and Sridhur and Banlinga (Siva) having been performed out of the above estate, the family of us, five brothers, shall be supported from the *prosad* (offerings to the deity), and you will also observe in honor of the deity Iswarjiu (Gopal) the ceremonies of Dole-jatra, Doorga-puja, Ras, Hindola, Nundotsab and all casual and daily ceremonies, &c., that is to say, the marriage ceremonies of your sons and daughters, the investiture of sons with the sacred thread, and the sradhs (offerings of funeral cakes) of father and mother. You are to pay to my *paratpar* (spiritual guide) an allowance of Rs. 5 every month, and Rs. 20 for the expenses of the family at Bakulia. You are authorized under this will to draw out, on giving receipts for, my Government promissory notes, which are deposited in the Collectorate of the 24-Pergunnahs as security for both of you, my second brother Ramkumar Mukerji, and for you, my third brother, Modhu Sudon Mukerji, and to carry out all the provisions aforementioned. You are further empowered to take back those promissory notes on giving receipts for the same, to draw the interest accruing thereon, and to sell them, &c., if necessary. All my ornaments and utensils of gold, silver, brass, pewter, &c., shall be divided equally among my three widows. You shall continue to reside with the family from generation to generation in those apartments of the dwelling-house at Kidderpore in which you live at present. To you, my eldest wife, Baroda Sunderi Debi, I have given a separate deed of permission to adopt a son in order to secure for myself the Jal-pinda ; and should you die before adopting a son as aforesaid, my second wife, Srimati Doorgamoni Debi, shall have the power to adopt a son, and on her death my third wife, Koilasbasini, is authorized to do so. The said adopted son shall, when he arrives at majority, be a manager in addition to the four mentioned above, that is to say, he shall make the management in the same way as you four shall do. Of the four persons aforesaid, should you and your heirs, as well as the adopted son when he arrives at majority, act contrary to the true religion of my ancestors, he shall be forthwith removed from the management mentioned in this my will. My three nephews (sisters' sons), namely, the three brothers Gonesh Chunder Banerji, Rango Lal Banerji and Hurri Mohun Banerji, of whom Hurri Mohun is a minor, shall get their food and raiment as they are doing at present ; and when they shall build their separate houses, they shall get the house formerly belonging to Jagamohun Shaha, which has been purchased benami in the name of Anund Chunder

1888

KAMINI DEBI v. ASUTOSH MUKERJI.

Banerji. My brothers and the others shall use my horses and carriages, &c., and keep (the latter) in repair in the same manner as they are now doing, and on your death these responsibilities shall similarly devolve on your heirs in the order of seniority, if they adhere to the ancient religion. No one shall have power to alienate the aforesaid properties by sale, gift, *hiba* or otherwise."

The testator died on the 1st of August 1845.

On the 11th September 1846 a certificate under Act XX of 1841 was granted to Ramkumar Mukerji alone, who continued to manage until his death in December 1859, when his brother Modhu Sudon succeeded him, retaining the management till his departure to Benares, about April 1878, at which place he died in October of the following year. His son Asutosh, one of the defendants in the present suit, managed the estate after his father's departure as his agent, and on his death assumed the office of shebait and manager of the estate of the deceased Ramkomul. The defendants in this suit were the heirs and representatives of Modhu Sudon, Nos. 1 to 7; 8, Damayanti Debi, the widow and heiress of the youngest brother Chunder Mohun; 9 and 10, the daughters of the fourth brother Dinonath, who died before the testator; 11 to 16 the representatives of the second brother Ramkumar. They all supported the will. Defendants 17 to 22 were the plaintiff's children, and 23 was her sister, a childless widow.

The defendants, besides supporting the will, urged that the suit was barred, as *res judicata*, by the decision in a previous suit instituted by Asutosh and his two brothers, defendants 1, 2 and 3 in the present suit, in which suit the present plaintiff was, among others, a defendant.

Damayanti Debi, No. 8, disclaimed the office of shebait in favor of the respondent Asutosh, who was, as she said, senior to all the other members of the family. He by his statement claimed as senior member of the family to be entitled, in accordance with the terms of the will, to the office.

Munmohini alleged that she, if the office was to go by seniority, was the eldest member of her father's family.

The suit, in which was made the decree on which the present respondents and cross-appellants relied as a conclusive adjudication barring the present suit, was brought on the 15th July 1863.

In that suit the plaintiffs were Asutosh Mukerji and his two brothers; and the defendants were the then shebait Modhu Sudon, Kamini Debi (the present appellant), with her husband (to whom she had been married after her father's death), Adhur Chunder Banerji, and also Bissambher Mukerji, with other members of the family. The plaint charged waste against the widow Baroda Sunderi and Modhu Sudon, two of the shebaits named in the will, in that they, in March 1862, had sold to the defendant Adhur Chunder Banerji one of the properties which had passed under the will, and asked to have that sale set aside; complaining also of the defendant Bissambher that he was wrongly obtaining the issue of attachments on the property. No specific relief was claimed against the defendant Kamini. She, however, answered in her written statement that the will was not genuine, and had never been acted on, claiming her father's estate by inheritance. The issues recorded in that suit questioned the genuineness of the will, the right of the plaintiffs to sue, and the validity of the sale. The Court of first instance, the Principal Sudder Ameen, held that the plaintiffs had a cause of action; that the will was genuine; and that the testator had effectively ordained that all the members of his family, as well as those of his brothers' families, should be maintained out of the *prosad*, instead of directing a more general distribution. He referred to *Sonatun Bysack* v. *Juggut Soonderee Dossee* (1). His decree declared that the sale to Adhur Chunder Banerji was invalid, and that Bissambher Mukerji had no right to have a judgment, obtained by him against Ramkumar, satisfied out of the testator's estate which had passed under his will.

Kamini Debi and Bissambher appealed to the High Court, and a judgment of a Divisional Bench dismissing their appeals was delivered on 25th May 1865. The conclusion of that judgment was as follows:—

"On the whole, then, we are of opinion that the will is genuine and untainted by fraud; that it has been carried into effect by the devisees; that the endowment is both religious and secular, and that the wishes of the testator have been departed from; that the plaintiff, as having a vested interest in the will, has a right to sue to protect that interest; that the

(1) 8 Moore's I. A., 69.

1888

KAMINI DEBI v. ASUTOSH MUKERJI.

sale to Adhur Chunder, who had every reason to know the circumstances of the family, and who never impugned the will for years, was improper and should be set aside; that the lien attempted to be made out by Bissambher fails on every ground; and that the decision of the Principal Sudder Ameen is in every point of view fit for confirmation."

The first of the issues fixed in the present suit in the Court of the First Subordinate Judge, Baboo Bhuban Chunder Mukerji, was whether the suit was barred under s. 13 of the Civil Procedure Code by the previous adjudication of the subject-matter. Having also fixed issues on other questions, among them, as to the validity of the will, and the construction to be placed on its provisions, he gave judgment to the effect that the decree in the suit of 1863 was a final determination of the matters in issue in the present suit. He considered that the testator's whole property was absolutely vested in the Thakur, and dismissed the plaintiff's claim by right of inheritance to the estate of her father, as well as her claim to be the sole preferential shebait.

His decree further ordered that the property having been vested in the Thakur, the plaintiff's claim to a partition be dismissed, and that the heirs and descendants of the five brothers, specifying them, "who are by Hindu law entitled to maintenance from the said five persons, shall be entitled to participate in the daily *prosad* of Gopaljiu Thakur as well as to reside in the Kidderpore dwelling-house." The will continued:—

"It is further declared that the expenses of the religious portion only of the ceremonies of sradh of the parents of the aforesaid persons, of the marriages of their sons and daughters, and of the jagnapobita ceremonies, shall be defrayed out of the income of the debutter estate, but on no account shall the said income be used in feasting Brahmins, &c., and other secular offices in connection with these ceremonies. It is hereby also declared that the said dwelling-house, along with the other properties of the testator, shall be under the control and management of the shebait for the time being, who shall look to the necessary repairs of the building as next in importance to the daily worship of Gopaljiu Thakur and distribution of *prosad* to the members of the family. The shebait for the time being shall strictly carry out the other provisions of the will concerning Doorga-puja, the celebration of Dole-jatra, Ras, Hindola and Nundotsab. If sufficient funds should not be forthcoming from the estate for their due celebration, then the religious portion of the ceremonies, *viz.*, the Pujas, &c., shall alone be performed. The defendant Damayanti Debi, who has the preferential right to be shebait, having declined to accept the duties of

shebait, the defendant Asutosh Mukerji, as the next senior member of the family, shall conduct all the duties in terms of the will."

On an appeal preferred by the plaintiff to the High Court a Divisional Bench (Sir R. GARTH, C.J., and W. MACPHERSON, J.) gave judgment on the construction of the will without referring to the issue in regard to the suit of 1863. The judgment referred to *Sonatun Bysack* v. *Juggut Soonderee Dossee* (1) and to *Ashutosh Dutt* v. *Doorgachurn Chatterjee* (2), and did not support the opinion that the property of Ramkomul had absolutely vested in the Thakur, though the worship was a charge on the estate. The judgment proceeded thus:—

"It is clear that nothing was further from the intentions of the testator than that the plaintiff (and her sister) should, subject to the debutter trusts, absorb the whole family property. It would also seem foreign to the wishes of the testator that those members of his family only who were living at his death should take the whole of those proceeds to the exclusion of those who might come into existence after his death. We think his intention evidently was, that his own family and the families of his four brothers should all be maintained in perpetuity out of the *prosad* or surplus proceeds after providing for the festivals and services of the idol, and the specific bequests mentioned in the will. We take it to be clear, however, that according to the doctrine laid down in the *Tagore case* (3), such a trust as this in perpetuity would be contrary to Hindu law. But we think that, if possible, we are bound to carry out the intentions of the testator in so far as they can be carried out in a legal manner; and we consider that this may best be done by construing the will as a devise of the surplus proceeds for the benefit of the heirs of the testator himself and of his four brothers in equal shares, so that the heirs of each of the five should be entitled to one-fifth of those proceeds.

"The next question is, whether the plaintiff is entitled under the circumstances to ask for a partition; and we think she is. A commissioner or commissioners must be appointed to carry out the partition; and if the parties cannot agree amongst themselves to appoint a commissioner or commissioners, the Court below will make the appointment."

The decree of the High Court was as follows:—

"It is ordered that the decree of the Court below, except in so far as it declares that the defendant Asutosh Mukerji is entitled to carry on the worship, be set aside, and this Court doth direct that an ample portion of the family property be set apart for the worship, festivals, &c., as

(1) 8 Moore's I. A., 69. (2) I. L. R., 5 Calc., 438; 5 C. L. R., 266.
(3) L. R., I. A. Sup. Vol., 47; 9 B. L. R., 377.

1888

KAMINI DEBI v. ASUTOSH MUKERJI.

provided in the will, and that the residue be partitioned into five shares to the heirs of the five brothers respectively, each section of the family holding their one-fifth share jointly, but subject to partition *inter se* if any of them should take proceedings for that purpose. And it is decreed that the Court below do appoint a commissioner or commissioners with a view to carry out the directions given above. And it is further ordered and decreed, in accordance with the finding of the Court below, that the defendant Asutosh Mukerji do continue to be shebait, and as shebait hold such portion of the family property as will be set apart for the worship, festivals, &c."

The present appeal having been filed by Kamini Debi, the defendants Asutosh and the others obtained leave to cross-appeal with reference to the effect of the decision in the suit of 1863, which the judgment of the High Court omitted to notice.

Mr. *R. V. Doyne*, for the appellant.—The plaintiff did not seek to bring into question the genuineness of the will, or to dispute that the maintenance of the *deb-sheba* was a charge on the testator's estate, in whatever form the charge might be expressed; and she was not precluded by the decree of 1865, establishing those matters, from contending that there was no valid disposition in the will of the surplus proceeds of the estate. The High Court had rightly held that the testator's real object was to provide for the members of his family in perpetuity, and to prevent alienation; but the result should have been, not that at which the High Court had arrived, but that this object failed, as tending to a perpetuity, in a manner contrary to the principle of Hindu law on this subject. The true conclusion was, that the provisions of the will could not be carried out, except as to the maintenance of the *deb-sheba*; and that the plaintiff, subject to the latter provision, was entitled to the surplus and residue of the estate by her hereditary title. There had been no such effective devise, as had been supposed by the High Court, of the surplus proceeds for the benefit of the heirs of the testator and of his four brothers in equal shares; and if attempted it would have been too remote and ineffectual for the reasons explained in the *Tagore case* (1). Supposing that Asutosh came in as shebait, giving maintenance to all the members of the families respectively, how long was that state of things to last? And, as addressed only to the point of *res judicata*, these

(1) L. R. I. A., Sup. Vol., 47; 9 B. L. R., 377.

questions were not such as had arisen when the suit of 1863 was before the Courts. Circumstances had varied the position of the parties since the judgment of 1865. That decision it was not sought to dispute. But the estate with the accumulations of after years could not have vested in its entirety. The judgment in *Sonatun Bysack* v. *Juggut Soonderee Dossee* (1) did not completely decide the question. If it were contended that this should have been brought forward by the present plaintiff when defendant in the suit of 1863, the answer was that the state of things now existing had not then arisen. He referred to the judgment in *Soorjeemoney Dassee* v. *Denobundo Mullick* (2).

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the respondents and cross-appellants, were not called upon.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—Their Lordships do not think it necessary to call upon counsel for the respondents; but they are of opinion, after hearing the very elaborate and careful argument of Mr. Doyne, that they are bound to decide that the greater portion of the matter comprised in these appeals has been decided in a former suit.

The question arises under the will of the testator Ramkomul, which contains a gift of the residue of his estate to a family idol. Then he appoints four persons, his three brothers and one of his wives, to be shebaits of the idol, and he directs them to perform certain matters of ceremony and worship, and after that he says, "the family of us five brothers shall be supported from the *prosad*," which is translated "the offerings to the deity." That is the whole of the will that contains any gift, excepting specific and pecuniary legacies, to the members of his family.

The testator died in the year 1845, and the property was managed apparently in accordance with the will by one or other of his brothers, who were shebaits until October 1879. The survivor of the brothers was named Modhu Sudon, and he remained in the management for a great number of years. He died in 1879, and then his son Asutosh, the defendant in the present suit, took the office of shebaitship and the management

(1) 8 Moore's I. A., 69. (2) 6 Moore's I. A., 526.

1888

KAMINI DEBI v. ASUTOSH MUKERJI.

of the estate, and has managed it ever since. There seems to have been no quarrel or litigation in the family until the year 1863, when the plaintiff's mother, who was one of the shebaits, died, and the plaintiff became the heir-at-law of the testator. Immediately after that event she applied for a certificate of the usual kind authorising her to collect the assets of the testator, on the ground that she was entitled to the property; that is to say she challenged the validity of the will. This and other causes seem to have led to the suit of 1863, which is the suit that bears on the present case.

Now the construction of that suit was in this fashion. The then shebait was Modhu Sudon. The sons of Modhu Sudon, of whom the principal appears to have been the present principal defendant Asutosh, complained that he had made improperly a sale of part of the testator's property to one Adhur Chunder Banerji. They also complained that a person of the name of Bissambher, who was an execution-creditor of Ramkomul, was improperly attaching his assets, and they made Modhu Sudon, Adhur Chunder, and Bissambher defendants to the suit, attacking the purchase of Adhur Chunder and the execution proceedings of Bissambher. But they also made the present plaintiff, the heir-at-law, and the other members of the family, parties to the suit, and the suit was in effect one for establishing the will against everybody concerned. The prayer was, "that the Court on giving effect to the above will may be pleased to set aside the purchase by the defendant Adhur," release the items attached by the decree-holder, and prohibit the defendant Modhu Sudon "from infringing the terms of the will hereafter."

The present plaintiff appeared to defend that suit, and in her defence she raised the question of the genuineness of the will. She prayed the Court "to dismiss this unjust claim and uphold rights which I have to the properties left by my deceased father." She claimed as heir-at-law, and on the face of her written statement there does not appear to be any ground stated excepting the charge as to the genuineness of the will. But when the issues came to be stated a wider question was propounded. There was not only an issue as to the genuineness of the will, but a further issue whether or no the plaintiffs had any

right to have instituted the suit. That is a very vague issue, and might mean much or little, but what it did mean is plain from the judgment delivered in the suit. In dealing with that particular issue the Principal Sudder Ameen says this: "The Court is decidedly of opinion that the plaintiffs have a right of action, inasmuch as their vested right has been infringed upon by the acts of the trustees," that is, of the shebaits; and, again, "that the plaintiffs have as well a vested right of maintenance from the *prosad* of the idol, as a contingent one of superintendence and management of the endowed property cannot, if the will is genuine, be doubted for a moment." That is to say, he held that the plaintiffs had a right of action, not because anything was given directly to them, but because they had a right of maintenance through the *prosad* of the idol. If they had not that right they could not have sued, but he maintains the gift to the family which is made through the sides of the idol from the offerings given to the idol. To support his finding upon that issue he has to examine the will very elaborately. He does so, and examines the authorities which are applicable to the case, and the conclusion he arrives at is this. It is stated several times over in the judgment, but it is only necessary to quote one passage from the record. "The gravamen of the defendant's contention now is, that the endowment was illegal, as far as the Hindu law was concerned, and it was only nominal, it being got up by the brothers of the testator, who were chiefly interested in giving effect to the will. On carefully weighing these objections, and considering all the surrounding circumstances of the case, I am of opinion that the provisions of the will are no more repugnant to the principles of the Hindu law than was the endowment created by it nominal." Then he refers to a decision of this Board, and in applying it to the present case goes on: "The will under review, after providing for legacies, created an endowment on behalf of the family idol, and directed to appropriate the surplusage, if any, for the benefit of the children of the trustees. Viewing then the will in its true light, and analysing its provisions with reference to the principle recognized in the above authoritative ruling, I am of opinion that the will is perfectly legal," and he decrees accordingly: "That the suit be decreed; that the will be declared genuine," and so

1888

KAMINI DEBI v. ASUTOSH MUKERJI.

forth, and he gave costs against the present plaintiff. He could not have decreed that suit unless he had held that there was, first, a valid gift to the idol, and, secondly, that the plaintiffs in that suit, who were not heirs of the testator and had nothing given to them excepting through the idol, had a valid gift made to them.

The present plaintiff was not satisfied with that decree, and she appealed to the High Court, and one of the grounds of appeal was thus stated: "The alleged will of Ramkomul Mukerji, even if genuine, was revoked by his conduct, and is invalid under the Hindu law, and indefinite and incapable of being carried out with reference to the different provisions of it, the trust being nominal," that is, illusory. Another ground was, "that the rights of all parties under the will, if genuine, have not been properly interpreted." Upon that the High Court again examined the question of the validity of the will. It appears to have been argued on behalf of the defendant Bissambher more than on behalf of the defendant Kamini, the present plaintiff, but it was argued before them "that, while holding the will to have been really signed and registered by Ramkomul, we should consider it as a scheme for retaining property which was in reality joint in the hands of all the members, and for holding the creditors of the estate or of any member of the family at defiance." They examine the arguments against the validity as distinguished from the genuineness of the will, and hold that it is valid, and they sum up thus: "On the whole then we think that the arguments both for Kamini and for Bissambher, that the will is either a nullity or a disguise to throw dust in the eyes of creditors, fail when weighed against" the considerations that they mention; and they conclude "that the decision of the Principal Sudder Ameen is in every point of view fit for confirmation." They therefore dismiss the appeal with costs.

Their Lordships take that to be a decision that the will contains a gift of the entire property to the idol; that the members of the family take only maintenance from the offerings made to the idol; and that it is a legal and valid gift in every respect.

Now what is the present suit? The present suit appears to their Lordships to be founded upon the total, or at least the partial, invalidity of the will. The first prayer of the plaint is "That upon a proper interpretation of the will of the said

Ramkomul Mukerji the Court will be pleased to determine and settle those provisions which are valid and lawful, and those which are illegal and invalid." Unless something in the will is illegal and invalid the plaintiff has no title whatever to get accounts or possession, or to do anything but to make a claim to the shebaitship. That she may do on the supposition of the entire validity of the will. It is not alleged that she has not received proper maintenance out of the offerings to the idol. She sues on the ground that there is some invalidity somewhere in the will, and that she, as heir-at-law, is entitled to take advantage of it.

Upon that view of the suit the Subordinate Judge held that the matter must be taken to be *res judicata*, having regard to the issues decided in the suit of 1863, and he ordered that the plaintiff's claim to get the estate of her deceased father by right of inheritance be dismissed. He also dismissed the plaintiff's claim for a partition, and he declared that the heirs and descendants of the five brothers, "who are by Hindu law entitled to maintenance from them, shall be entitled to participate in the daily *prosad* of" the idol, and to reside in a certain dwelling-house which was another matter in dispute. Her claim to be the preferential shebait of the idol was dismissed, not as *res judicata*, but as not warranted by the will.

An appeal was preferred from th at decree to the High Court which differed in opinion from the Subordinate Judge. On reading the judgment of the High Court it does not appear that they noticed the suit of 1863 at all. They do notice the plaintiff's application for a certificate in 1863, but the suit they leave entirely unnoticed. Why that happened is not explained, but it is a matter complained of in the cross-appeal presented by Asutosh. Their Lordships are left without any means of understanding how it was that the judgment came to be delivered without any observation upon the suit of 1863. However, the matter has been fully argued now, and their Lordships are of opinion that the view of the Subordinate Judge was right.

The case is governed by s. 13 of X of 1877, and the question is whether the point now raised is a point heard and decided by the Court in 1863, in a suit in which the present plaintiff was defendant, and the present defendants were plaintiffs. Their Lordships' reasons have been assigned for thinking that the

1888

KAMINI DEBI v. ASUTOSH MUKERJI.

question of the invalidity of the will was a point decided in that suit; that it was decided that the will was wholly valid, and passed the entire estate to the idol; and that the same question cannot now be raised.

Their Lordships express no opinion whatever whether they agree or disagree with the High Court on the construction of the will of Ramkomul. It may be that the opinion of the High Court now expressed is preferable to the opinion of the High Court expressed in the suit of 1863, but they consider that that question is not open to them. The matter was decided between the parties and never can be re-opened.

Then there remains only one question to be decided in the suit, and that is whether the plaintiff has a preferential title to be shebait. That depends upon one sentence in the will, which was written in Bengali, and their Lordships have only the English translation. The English translation is by no means easy to interpret. It seems there is some difficulty also in the Bengali original, but the Subordinate Judge was able to criticise the Bengali grammar, and he delivered as his opinion that the effect of the will was to constitute as shebait the senior in age of the heirs of the original shebaits. The actual senior has disclaimed. The defendant Asutosh is the next senior in age, and therefore the Subordinate Judge held that Asutosh is the proper shebait. The High Court, without discussing the matter, have agreed with him, and their Lordships, being unable to appreciate the exact sense of the Bengali sentence, can only say that no reason has been assigned to them why they should differ from the opinion of both the Courts below.

The result is that the appeal of the plaintiff wholly fails and the cross-appeal wholly succeeds. The High Court, in their Lordships' opinion, ought to have dismissed the appeal to them with costs, and their Lordships will now humbly advise Her Majesty to make a decree to that effect, and the usual consequences will follow. The appellant Kamini must pay the costs of the appeal and the cross-appeal. *Appeal dismissed; cross-appeal allowed.*

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitors for the respondents and cross-appellants: Messrs. *T. L. Wilson & Co.*

C. B.